



No. 876. 725 76.

Brief of Keeler for D. C. (ing)
Filed Mar. 9, 1896.

FILED
MAR 9 1896
JAMES H. McKENNA

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1895.

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HARTFORD FIRE INSURANCE COMPANY ET AL
PLAINTIFFS IN ERROR,

vs.

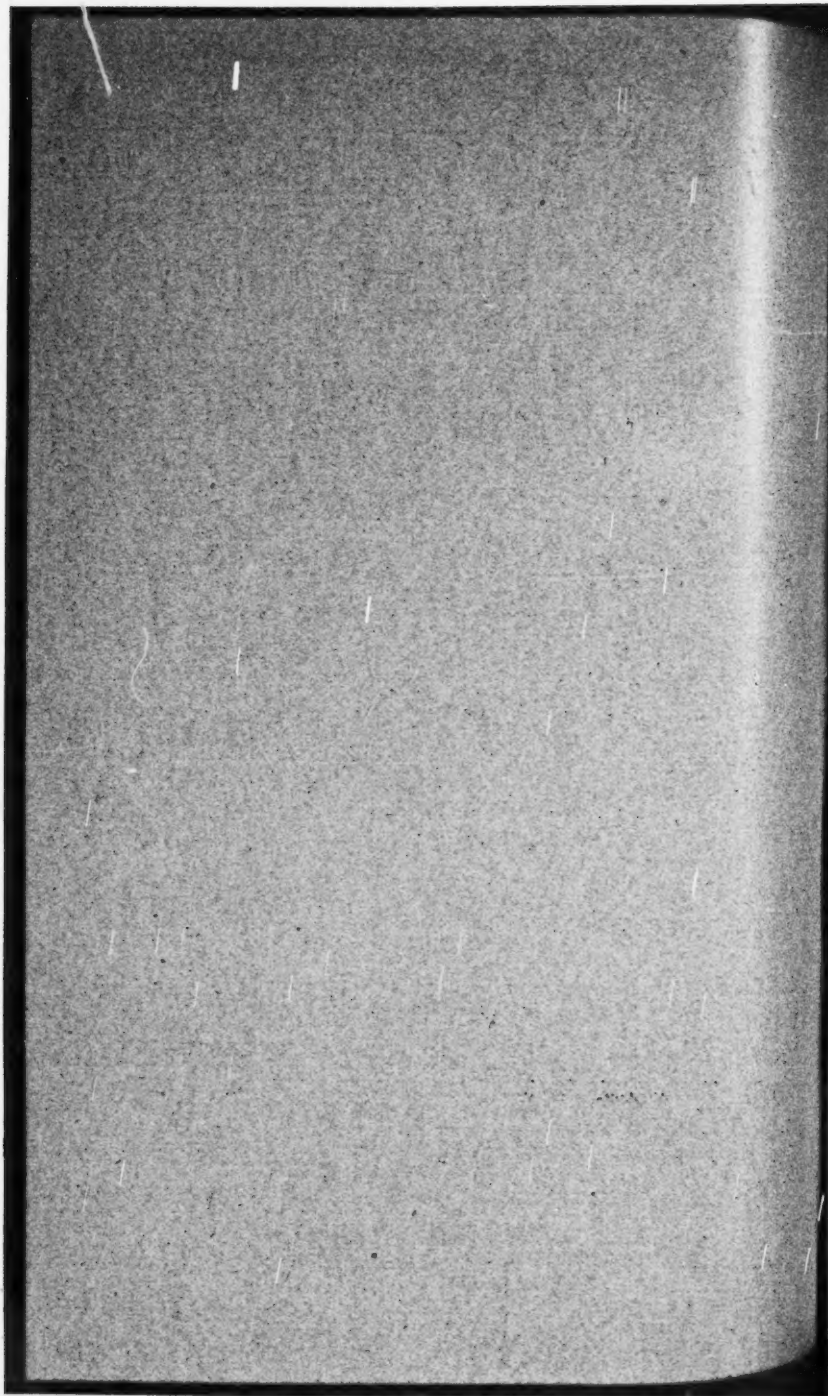
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY
COMPANY, DEFENDANT IN ERROR.

ON PETITION OF PLAINTIFFS IN ERROR FOR WRIT OF CERTIORARI TO
[THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.]

BRIEF FOR RESPONDENT.

CHARLES B. KEELER,

Counsel for Respondent.



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BRIEF FOR RESPONDENT.

I.

STATEMENT OF THE CASE.

The record discloses that by written instrument dated February 1, 1890, Simpson, McIntire & Co. leased from the Chicago, Milwaukee and St. Paul Railway Company, for the term of one year, a portion of its station grounds at Monticello, Iowa, for the purpose of erecting and maintaining thereon a cold storage warehouse, in close proximity to the railroad tracks. The rent was merely nominal, being only \$5 a year. This lease was made and accepted,

“Upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators and assigns, do hereby expressly release them from all liability or damage by reason of any injury to, or destruction of, any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company.”

Under the terms of this lease, Simpson, McIntire & Co. entered upon the demised premises and erected thereon the cold storage warehouse in question. After expiration of the year they continued in possession, under the terms and conditions of the original lease, and were so occupying at the time of the fire. On November 11, 1892, said warehouse and contents were totally destroyed by fire, the loss aggregating about \$27,118.88; being \$7,000 on building and \$20,118.88 on butter and eggs. Insurance companies holding policies thereon, paid \$23,450 in settlement, and being thereby subrogated, *pro tanto*, to any rights of the insured, in May, 1893, brought suit against the railway company to recover the amounts so paid, alleging that the fire was set by negligent operation of its trains. Simpson, McIntire & Co., owners of the balance of the claim, refusing to join as plaintiffs, were made nominal defendants; but they filed a written disclaimer of interest in the litigation, and asked to be dismissed and relieved from liability for costs.

This suit was begun in the District Court of Jones County, Iowa, and removed by defendant to the Circuit Court of the United States for the Northern district of

Iowa. In defense of the action said railway company pleaded the exemption contained in the foregoing clause of its lease. Plaintiffs demurred upon the ground that such exemption from liability for negligence was contrary to public policy and void. At the argument it appeared that the Supreme Court of Iowa, in the case of *Griswold v. Ill. Cent. R. R. Co.*, 53 N. W. Repr., 295 had first thought that a similar exemption in a railroad lease was opposed to public policy, but, upon rehearing, had afterwards reached an opposite conclusion, and had finally held that such exemption or release was not in violation of the statutes of Iowa or contrary to any *public policy* of that state, but was lawful and would be enforced by the Iowa courts. It also reaffirmed such decision, by denying a second rehearing.

Griswold v. Ill. Cent. R. R. Co., 90 Iowa, 265.

The Circuit Court, Shiras, J., without intimating his opinion upon the question, considered as a new one, thereupon held that he ought to follow the decision of the state court and sustain the validity of the lease in question. This upon the ground that in so far as that court had based its holding upon the fire statute of Iowa, it was binding upon Federal courts, and in so far as such decision rested upon a determination of the public policy of the State of Iowa it was equally authoritative, because the question was essentially a *local* one, to be settled by the legislature or courts of the state itself. This opinion is reported in

Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co., 62 Fed. Repr., 904.

The court thereupon overruled the demurrer, and plaintiffs electing to stand thereon, judgment was rendered

against them for costs. They sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, and on October 7, 1895, that court, Sanborn, J., filed an opinion affirming the judgment below, upon the broad ground that the exemption in question was not contrary to public policy, but was valid and enforceable, as a question of general law.

Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co., 70 Fed. Repr., 201.

Plaintiffs in error now apply for a writ of certiorari to review this decision of the Circuit Court of Appeals.

II.

BRIEF AND POINTS.

It is well settled that the granting of a writ of *certiorari* to review a decision of the Circuit Court of Appeals, rests entirely within the discretion of this court, and is allowed only when questions of gravity and importance are involved.

In re Woods, 143 U. S., 205.

Lau Ow. Bew. v. U. S., 144 U. S., 58.

Accordingly, this court has held that the power to grant such writ, was "a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity, and general importance, or in order to secure uniformity of decision." And it was said that "while there have been many applications to this court for writs of *certiorari* to the Circuit Court of Appeals, under this provision, only two have been granted."

Am. Con. Co. v. Jacksonville Ry., 148 U. S., 383.

C. & N. W. Ry. Co. v. Osborne, 146 U. S., 354.

Upon this application, therefore, the sole inquiry is, "whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for, in order that the case may be reviewed and determined as if brought here on appeal or writ of error."

Lau Ow Bew's case, 141 U. S., p. 587.

In the light of these decisions, we contend that the questions involved in the case at bar, are not of sufficient gravity or doubt to justify a review by this court. At the outset, we call attention to the fact that these questions are misconceived and misstated in the petition and brief of counsel for plaintiffs. They put them thus:

"*First.* A railway company neglects to furnish station facilities in the form of cold storage warehouses and grain elevators, and thus compels its patrons, the public, to furnish these requisite conveniences and facilities for themselves; the railway company granting, however, to the patrons who furnish such facilities, a license in the form of a lease at purely nominal rent, to erect and maintain such elevators and warehouses on its station grounds, and adjacent to its side-tracks. Under such circumstances, can the railway company annex to its said license or lease, a condition that it shall not be liable for its own negligence in burning such warehouses and freight stored therein for shipment? Is such an attempted limitation of the liability of a railway company for the destruction of the freight and other property of its patrons, contrary to public policy and void? The Court of Appeals of the Eighth Circuit held such limitation a valid one. It is this decision which is now sought to be reviewed." (Petition for writ, pp. 1, 2,)

We insist that no such questions are involved in this case, and that no such holding was made by the Court of Appeals. There can be no doubt upon this point. The facts are contained in plaintiffs' petition, and defendant's amended answer. There is absolutely nothing in the record to warrant a claim that this railway company neglected to furnish proper station facilities or compelled its patrons to provide such accommodations for themselves. So far as appears, the company had ample facilities at Monticello for the proper receipt and storage of all products delivered to it for transportation, or awaiting delivery after carriage. This lease was not made to Simpson, McIntire & Co. as shippers, or in respect of any duty or obligation of the lessor as a common carrier. They simply rented vacant land upon which to erect a private warehouse for the safe and convenient storage of butter and eggs, for themselves and others. If the owners afterwards desired to ship such products over defendant's railway, and tendered or delivered them to the company for transportation, *then* would first arise the relation and consequent duties of shipper and carrier. But no such state of facts existed in this case.

That we are correct in this position, is shown not only by the record itself, but also from the language of the Court of Appeals. They say :

"The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company, none of it was awaiting delivery by the company to its consignees after transportation, and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the

store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its position of a common carrier, or by its character of a quasi public corporation."

"It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that if it employed Simpson, McIntire & Co., to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. *Stock Yards Co. v. Keith*, 139 U. S., 128, 133, 136; 11 Sup. Ct., 461. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire & Co., to receive or store any of the goods of its shippers."

*Hartford Fire Ins. Co. v. C., M. & St.
P. Ry. Co.*, 70 Fed. Repr., pp. 204
& 6.

The real issue presented by this record and decided by the Court of Appeals, was stated by Mr. Justice SANBORN in the following language:

"Is a condition, in a lease by a railway company, of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon, caused by fire set by its locomotives, or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case." (p. 202.)

It will be seen at once that this question is vitally different from the one stated by counsel for petitioners, and involves other principles. We shall advert to them hereafter.

III.

Again, the application for this writ is based, in part, upon the erroneous assumption that the judgment below was affirmed by a *divided* court, and that there was a serious difference of opinion among the judges of the Circuit Court of Appeals as to the correctness of the ground upon which it was rendered. This error is made the foundation of counsel's claim that "The questions of law involved in this action are in a state of grave and serious uncertainty."

(Petition for Writ, Par. 14 & 18, pp. 7, 8.)

They say: "In the Court of Appeals Judge Caldwell refused to join in the affirmance of the judgment below, except upon the express ground that the Federal courts were bound by the decision in the *Griswold* case. As to the validity of the exemption in the lease, as an original proposition, he said, in the last clause of his dissenting opinion, '*the question as presented by this record is not free from doubt*'. It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case.' Judges Sanborn and Thayer held that they were not bound by the decision in the *Griswold* case, but sustained the exemption from liability for negligence, contained in the lease, as the same was specifically set up by the defendant in error." (Brief, p. 8.)

We think that counsel for petitioners misapprehend the language and pervert the meaning of Judge Caldwell's separate opinion. He nowhere expresses, or even intimates disagreement with Judges Sanborn and Thayer in holding that the exemption from liability, in this lease, was not contrary to public policy, *considered as a question of general law*. He utters no word of dissent with the

reasoning or conclusion, upon that proposition. Upon the contrary, says:

"I concur in the conclusion reached in this case, *but dissent from this statement* in the majority opinion, namely: 'Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy, is a question of general law, and not dependent solely upon any local statute or usage.'"

To make his meaning more clear, Judge CALDWELL adds:

"*There is no difference of opinion between the Supreme Court of Iowa and this court, as to the validity of the lease and all its conditions, and there is, therefore, no occasion for this court to express an opinion upon the question whether it would be bound by the decision of the Supreme Court of Iowa, if the two courts differed in opinion on the question of public policy.*" (70 Fed. Repr., p. 208.)

Does not this language plainly mean that all the justices of the Circuit Court of Appeals agree in holding the conditions of this lease to be valid and enforceable, but that one dissents merely from the *dictum* of his associates upon another point, not necessary to the decision. His concluding remarks: "The question as presented by this record, is not free from doubt, etc.," clearly refer to the point he was considering, and not to the conceded question of the validity of the exemption clause in this lease. We submit that the opinion discloses no disagreement between the learned judges of the Circuit Court of Appeals, upon the question on which the decision was based.

In this respect they were in entire accord with the Supreme Court of Iowa; and refer to the *Griswold* case as holding, "after repeated argument and the most careful deliberation," that such provision in a railroad lease,

"violated no law of that state, was not injurious to the public interests, and was not against public policy." They further say: "It constitutes an authoritative construction of the statutes of the state and a very persuasive authority that the contract here in question is not contrary to public policy." (70 Fed. Repr., p. 203.)

It thus appears that the only courts which have ever passed upon this question, are in accord in their holding. Even counsel do not claim that these decisions are in conflict with this court. They say: "The precise questions now involved have not been decided or passed upon here. Indeed, they are practically new questions." (Brief, 10.) We maintain that no "conflict" of judicial opinion exists, and that the decisions are not "in a state of grave and serious uncertainty" upon this question. Therefore, no reason of that nature now requires or justifies a review of the case by this honorable court.

IV.

THE EXEMPTION CLAUSE OF THIS LEASE WAS NOT CONTRARY TO PUBLIC POLICY OR VOID.

The term "public policy" does not admit of exact definition or precise explanation. Perhaps the most concise and accurate general definition is that of the Supreme Court of Illinois:

"Public policy is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."

People v. Gas Trust, 130 Ill., 294.

Of necessity, there can be no fixed and unalterable standard of public policy. It varies in different countries,

The same holding has recently been made in California.

and even in different states or localities of the same country. It differs, also, in the same community with different years, conditions and interests. It changes with the advance in civilization, the variation in climate, the physical or political conditions, and even with the growth of states. It has been aptly described as a "variable quantity."

"One thing I take to be clear, and it is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities and opportunities of the public."

Davis v. Davis, 36 Chy. Div., 359.

"The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

Evanturel v. Evanturel, L. R., 6 P. C., 29.

Maxim-Nordenfeldt, & Co., v. Nordenfeldt, 3 Chy., 665.

"Public policy is variable—the very reverse of that which is the policy of the public at one time may become public policy at another."

Griswold v. Ill. Cent. R. R. Co., 90 Iowa, p. 268.

"The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."

Pope Mfg. Co. v. Gormully, 144 U. S., p. 233.

"The term 'public policy' or 'policy of the law,' suggests but a vague and uncertain principle, and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned."

Rogers v. Steamboat Co. (Me.), 29 Atl. Rep., p. 1074.

"Public policy changes with the changing condition of the times. * * * When it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft-quoted remarks of Justice BURROUGH in *Richardson v. Mellish*, 2 Bing., 252, that public policy 'is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law.'"

SANBORN, J.: In *U. S. v. Trans.-Mo. Ft. Assn.*, 7 Cir. Ct. App., p. 72.

"The term, as it is often popularly used and defined, makes it an unknown and variable quantity—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state, on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice and to which they give effect, must be deducted from these sources."

CALDWELL, J.: In *Swann v. Swann*, 21 Fed. Repr., 301.

"The public policy of a state or nation must be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Vidal v. Girards's Exrs.*, 2 How., 127, 197."

SANBORN, J.: In *Hartford Fire Ins. Co. v. C. M. & St. F. Ry. Co.*, 70 Fed. Repr., 202.

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is

one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not likely to interfere with this freedom of contract."

JESSEL, M. R. : In *Printing & Num. Reg. Co. v. Sampson*, The Law Repts., 19 Equity, 465.

Griswold v. Ill. Cent. R. R. Co., 90 Iowa, 269.

And it has been forcibly said :

" The power of courts to declare a contract void for being in contravention of sound public policy, is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

Richmond v. Ry. Co., 26 Iowa, 202.

Kellogg v. Larkin, 3 Pinney (Wis.), 123.

In the case at bar, it does not appear, and cannot be presumed, that the lease in question contemplated any relations between lessor and lessee by which the public duties and obligations of a common carrier were to arise or be performed. There is absolutely nothing in the record to warrant such claim. The mere fact that a railway company sustains a quasi public relation as carrier of freight and passengers, does not preclude it from leasing portions of its right of way for private use, upon such terms and conditions as may be mutually agreed upon. The provisions of this lease did not affect any public duties which the lessor, in its other capacity of common carrier, might be subject to. It must be conclusively presumed that this railway company possessed adequate and

ample station facilities at Monticello for the proper handling and storage of all products delivered or tendered to it for transportation, or awaiting delivery to consignees after carriage. So far as appears, it was both able and willing to perform, in a prompt and efficient manner, every duty owing to the public at large or to any individual member thereof. There can be no pretense that its service was inadequate or its accommodations insufficient. Simpson, McIntire & Co. made no complaint. The record does not indicate that they shipped, received, or offered to ship or receive, any butter and eggs over defendant's line of railway. It does show, however, that as dealers in those products, they rented vacant ground adjoining the tracks "*for the purpose of erecting and maintaining thereon a cold storage warehouse.*" (See lease.) It is probably true that the lessor expected, and the lessees contemplated, future shipments from this warehouse when winter season and higher markets should make it profitable to sell, and, doubtless, the expected benefits arising from carriage of such products at some future time, was one of the inducing motives to the railway company to make this lease at a nominal rental; but the contract itself concerned no public duty, and its conditions violated no existing obligation of a common carrier.

These considerations were clearly and ably set forth in the learned opinion of the Circuit Court of Appeals. In view of the plain record, we are utterly at a loss to understand why counsel for petitioners persist in misstating the question at issue in this case. They cite and rely upon the decision of this court in *Covington Stock Yards v. Keith*, 139 U. S., 128. The doctrine of that case is not questioned. It holds that suitable and sufficient station facilities, such as depots, warehouses and stock yards, are

necessary to the proper discharge of the public duties of a common carrier, in the receipt, carriage and delivery of freight, and that a railway company cannot neglect to provide such accommodations itself, or exact a special charge therefor, if furnished by itself or others. There can be no question that this rule would apply with full force to the defendant company, in the conduct of its business *as a common carrier*, but in the case at bar it did not act or contract in any such relation. It owed no public duty to Simpson, McIntire & Co., and violated none, as Mr. Justice Sanborn has pointed out with great clearness and force. The fallacy of counsel's argument lies in the fact that it fails to distinguish between the public duties and the private rights of this railway company.

But, counsel further contend that, apart from its obligation as a common carrier, this railway company owed to Simpson, McIntire & Co. a separate and additional duty of care not to destroy their property by fire negligently set in the operation of its road, which duty it could not evade by contract. In this inquiry it becomes important to ascertain the situation of the parties, and their relative duties and obligations, before as well as after the making of this lease.

To those who own or occupy land adjoining their tracks, railway companies owe a duty of ordinary watchfulness and care to prevent loss, or damage by the escape of fire in the operation of trains. Each party being in the independent exercise of a legal right, both must use reasonable care to avoid injury to the other. But if the same persons come themselves, or bring their property upon the private right of way, without permission, they become *trespassers* in law, and the railway companies are liable only for willful or wanton injury. Numerous decisions of

courts have settled this rule of law, which is equally applicable to persons or property.

Ry. Co. v. Tarrt, Admr., 12 Cir. Ct. App., 6.

Crane Elev. Co. v. Lippert, 11 Cir. Ct. App., 524.

Morgan v. R. R. Co., 19 Blatch., Cir. Ct. Repts., 239.

Ry. Co. v. Bennett, 69 Fed. Repr., 525.

Kirtley v. Ry. Co., 65 Fed. Repr., 386.

R. R. Co. v. Godfrey, 71 Ill., 506.

R. R. Co. v. Hetherington, 83 Ill., 510.

Blanchard v. Ry. Co., 126 Ill., 416.

Wright v. R. R. Co., 142 Mass., 296.

Morrissey v. R. R. Co., 126 Mass., 377.

Chenery v. R. R. Co., 160 Mass., 211.

R. R. Co. v. Graham, 95 Ind., 286.

Splittorf v. State, 108 N. Y., 213.

Before the execution of this lease, Simpson, McIntire & Co. had no rights whatever upon defendant's ground. Had they erected this cold storage warehouse thereon, without permission, the railroad company could not have been held liable for its destruction by fire set through negligence. Being there either as trespassers or as mere licensees, no active duty of care towards them or their property would be imposed upon the company in the operation of its engines and trains, but only the mere negative obligation of abstaining from willful or wanton injury.

They could not compel the company, against its will, to lease any part of the right of way, or to permit them to erect buildings or store property thereon. For their

own private benefit and advantage Simpson, McIntire & Co. sought to secure privileges which the law did not give them, and which they could acquire only by consent of and contract with the owner of the land. They applied for a lease of ground upon which to erect and maintain a warehouse in close proximity to railroad tracks in daily use, wherein were to be stored butter, eggs and other perishable products. If such permission was granted, without restriction, a new and continuing obligation would thereby be imposed upon the company, namely: the duty of exercising reasonable watchfulness and care to prevent burning this building and contents by fire set through negligence of its servants, whose conduct it could not always supervise or control. This duty did not concern defendant's ordinary business as a common carrier, nor was it a burden which held itself out to the public as undertaking for all who desired to locate upon its right of way. Upon the contrary, it was a duty created and existing wholly by mutual agreement and therefore to be measured by the terms of such contract.

The railway company therefore announced, in effect, that it would not consent to assume or carry this additional and perhaps onerous risk, not obligatory upon or beneficial to it, but would grant the desired privileges, at a merely nominal rent, *provided, and upon the express condition only*, that the lessees should carry such risk themselves, and relieve the company therefrom. This proposition was voluntarily accepted by Simpson, McIntire & Co. Both parties stood upon an equal footing, and understood and mutually agreed upon such terms, by executing the lease in question. The lessees occupied under it for the full term, and longer, and having received the benefits now refuse to repudiate the burdens of this

contract. They *disclaim* of record any right to recover for the balance of their loss, beyond the insurance received.

The real situation was clearly and forcibly stated by the Court of Appeals, as follows: "A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity and care after a lease containing such a contract is executed that it would have been required to exercise if no such agreement had been made. *Express Co. v. Caldwell*, 21 Wall, 264, 267, 268. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employes or passengers of the company, and the parties to it stand upon an equal footing when the lease is made, because each is free to make or refuse to make the contract." (70 Fed. Repr., p. 208.)

Upon this state of facts, we submit that no public policy was violated by enforcing the mutual agreement of these parties. If Simpson, McIntire & Co. saw fit to contract for special privileges upon condition of carrying the attendant risks, wherein were the public prejudiced, or even concerned? Two Massachusetts cases are directly in point.

In *Bates v. Old Colony Railroad*, and *Hosmer v. Same*, express messengers, holding season tickets over the railroad and desiring to ride in baggage cars for business purposes, contrary to train rules, expressly agreed to assume all risks of injury while there, and to hold the company harmless therefrom. The trains were derailed through negligence of railroad employes, and the messengers received injuries thereby. In the first case,

plaintiff's presence in the baggage car directly contributed to his injuries, but in the latter it did not. In each suit the court held that the contract for immunity was valid and would be enforced, saying:

"It is difficult to see upon what ground it can be contended that an agreement of the plaintiff, that in consideration that the defendant would permit him to ride in the baggage car he would assume all risk of injuries resulting therefrom, is unreasonable or illegal. The defendant was under no obligation to give the permission, and the effect of the plaintiff's agreement was only that the liability of the defendant should not be increased by the permission that the plaintiff, if he should be injured in consequence of being in the baggage car, should not be entitled to recover damages of the defendant, on the ground that he was there by its permission. The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties does not arise under this contract as construed in this case."

Bates v. Old Colony R. R., 147 Mass., p. 265-6.

Hosmer v. Same, 156 Mass., p. 507.

The same principle is further illustrated by what is known as the "circus-train cases." In June, 1892, this defendant company made a special contract to haul a circus train over its road between certain points on different days and at rates less than the regular tariff for carriage of persons and freight. In consideration of the reduced rate and increased risk it was stipulated that the company should not be liable for any injury to persons or property "from any cause." The train was derailed and part of the circus property destroyed through negligent condition

of the track and running of the train. In a suit to recover such loss the Circuit Court of Appeals for the Seventh Circuit held that the contract was valid and binding, upon the broad ground that the railway company contracted as a private and not as public carrier, and therefore could lawfully stipulate for indemnity against the results of its own negligence.

C., M. & St. P. Ry. Co. v. Wallace, 14 Cir. Ct. of App. Repts., 257; *s. c.* 66 Fed. Repr., 506.

To the same effect are the following authorities:

Coup v. Ry. Co., 56 Mich., 111.

Robertson v. Ry. Co., 156 Mass., 525.

Forepaugh v. Ry. Co., 128 Pa. St., 217.

Piedmont Mfg. Co. v. R. R. Co., 19 So. Car., 353.

The principle is thus stated:

“A common carrier may undoubtedly become a private carrier or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry.”

R. R. Co. v. Lockwood, 17 Wall., 377.

Liverpool, &c., Co. v. Ins. Co., 129 U. S., 440.

Hutchinson on Carriers, 2nd Ed., Secs. 44 & 73.

If a railway company can carry an express messenger, or a circus train over its road, as a private and not as a public carrier, upon what legal basis can it be argued that the same company cannot lease its own land to a private partnership upon like terms of immunity from negligence of its servants? Have the public any greater interest in

the latter than in the former contract? Clearly not. We submit that the doctrine of the Bates and Wallace cases are decisive of the rule for which we contend. It is strenuously urged that all contracts which seek to relieve one party from legal liability for its own negligence, or that of its servants, are contrary to public policy and void. The proposition is not universally true. Some contracts are and others are not invalid, upon this ground. For instance, it is well settled, "that the private carrier may by contract with his employer, exonerate himself from liability on account of his inattention or want of diligence or skill in the execution of the trust. He may stipulate that he shall in no event be liable except for fraud or its equivalent."

Hutchinson on Carriers, 2nd Ed., Sec. 40.

Wells v. Steam Nav. Co., 2 Comstock, 204.

Alexander v. Green, 3 Hill., 9.

The principle is, that common carriers may become private carriers when, by special contract, they undertake to transport property which it is not their business to carry. This applies to all private bailees for hire. The public carrier, being obliged to serve all equally, within the range of his employment, by common law is forbidden to exact unreasonable or oppressive terms, but the private carrier or bailee is free to impose what condition he will. If accepted, it is mere matter of private contract in which the public are not concerned.

Again, this lease was outstanding when the insurance companies issued their policies upon this warehouse and contents, and they actually knew or were chargeable with knowledge of its terms, including the condition of exemption in question. They voluntarily contracted with Simpson, McIntire & Co. to assume and carry the same risk

of loss by fire negligently set in operation of the railroad, which that firm had previously agreed with the railway company to assume and carry themselves. In other words, these companies insured the lessees against the very risk that such lessees had previously insured their lessor against. *In effect, a re-insurance.*

Upon this point, the Court of Appeals said :

"It goes without saying that the railroad company could have legally employed an insurance company to indemnify it against loss by fire occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had, in effect, insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid." (70 Fed. Repr., 206.)

In *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S., 321, this court held that an insurance contract was not unlawful or against public policy, which directly indemnified a common carrier against loss by fire, occurring through its own negligence, to goods in its possession for carriage, saying :

"No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, *though occasioned by the negligence of his own servants.*" (p. 324.)

So, where an insurable interest in property exists, insurance against loss by one's own negligence is lawful.

Ins. Co. v. Lawrence, 10 Peters, 507.

Johnson v. Ins. Co., 4 Allen, 388.

Shaw v. Roberts, 6 A. & E., 80.

V.

In support of their contention that this lease was contrary to public policy and void, counsel for petitioners strongly rely upon that line of decisions of which *R. R. Co. v. Lockwood*, 17 Wall., 357, and like cases are leading examples, and where this court lay down the rule that common carriers cannot lawfully stipulate with shippers for exemption from the consequences of their own negligence. Your Honors refused to follow decisions of the State of New York upholding such agreements, and the doctrine has since been applied to other contracts of public carriers, both as to passengers and freight. These cases rest upon considerations peculiar to themselves. The stipulations were there made (or exacted) by public carriers *acting in that capacity, and in respect of duties and obligations which they admittedly owed to the public, and in which the state had a direct interest.*

It was said that "the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law."

R. R. Co. v. Lockwood, 17 Wall., p. 381.

But even in that case, the court say: "*If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public.*" (p. 379.)

It is to be observed that in the later case of *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, Mr. Justice GRAY, in analyzing and restating the doctrine of the Lockwood opinion, expressly puts it upon *common law principles*. He says: "By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servant's negligence." (p. 439.)

This class of cases is not in conflict with our position because the facts are vitally different. The lease and exemption in question were not *exact*ed by defendant, or obtained in its capacity as a common carrier, or in respect of duties obligatory under such relation, out of an unwilling but helpless patron. They were voluntary transactions between parties acting in the private and independent situation of lessor and lessee, and concerning the terms and conditions upon which a leasehold interest in or right to real estate should be created and enjoyed. Simpson, McIntire & Co. had absolutely no right whatever to occupy this land without the owner's consent. Such consent might be given upon terms which they were free to accept or reject. If voluntarily agreed to wherein were the general public concerned, or how did the company evade its public duties as a common carrier? It is conceded that *if* such had been its effect, the statute of Iowa (1 McClain's Code, Sec. 2007), would have avoided the lease. But the Supreme Court of that state in the Griswold case, held that it did not. If this decision is not a construction of state statute which this court should follow, is not its reasoning persuasive and convincing upon the question, considered as one of general law?

The public have a direct interest in the careful performance of those duties which essentially and necessarily inhere in the relation of common or public carrier, and it may well be said to be against public policy to uphold contracts which, in effect, allow the carrier to abdicate or ignore imperative public duties. In this respect the United States have a public policy independent of that of each state. The power to regulate interstate commerce—carriage of persons and property—creates and requires a *national policy* in those respects, which should not be controlled by local and frequently conflicting policies or interests of the several states. These, and other considerations, might well sustain the doctrine of the Lockwood case, and similar decisions, without affecting in the least the rule for which we contend.

In *Hart v. Ry. Co.*, 112 U. S., 331, it was held not to be contrary to public policy for a common carrier of goods to stipulate for an agreed (low) valuation in the event of loss by its own negligence.

Again: The class of cases which hold that it is contrary to public policy for an employer to exact from the employe, as a condition of employment, release of liability for personal injuries thereafter sustained by negligence of the master or his servants (of which *R. R. Co. v. Spangler*, 44 Ohio St., 441, is an example), rest upon peculiar and entirely different considerations. In the first place, it is well said that the state has a direct interest in the lives of its citizens. The welfare and prosperity of the public are concerned in the preservation of the lives and limbs of its members. A mutilated man is a burden, and a dead man a loss to society. The life and service of each individual is of value to the state. Intentionally or negligently to deprive it of either, is forbidden by positive

law and public policy. Another reason is found in the *disparity* between the contracting parties. They do not stand upon the same footing or contract with equal freedom. The working man must labor, the capitalist is not compelled to hire. Such contest is unequal, and the weaker party is practically forced to barter away rights in which the public are interested.

It was this very thought of inequality and subjection which largely influenced this court in the *Lockwood* and similar decisions, when it was said :

“ *The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice, etc.* ”

GRAY, J., in *Liverpool Steam Co. v. Ins. Co.*, 129 U. S., 441.

BRADLEY, J., in *R. R. Co. v. Lockwood*, 17 Wall., 379.

But these forceful reasons have no application to contracts of indemnity against negligence, where mere *property* is concerned ; where the parties stand upon a perfect equality, and where capital seeks the use of private land for private purposes. We submit that no well considered case invalidates a contract like the one at bar. It should be added that all these considerations received attention in the learned and exhaustive opinion of the Court of Appeals in this case, (pp. 204, 205) and its conclusion was expressed thus :

“ The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. *U. S. v. Trans-Missouri Freight Assn.*, 7 C. C. A., 15, 82, 58 Fed., 58 ; *Printing and Registering Co. v. Sampson*, L. R., 19 Eq., 462 ; *Tallis v. Tallis*, 1

El. & Bl., 291; *Rousillon v. Rousillon*, 14 Ch. Div., 351, 365; *Stewart v. Transportation Co.*, 17 Minn., 372, 391 (Gil., 348); *Marsh v. Russell*, 66 N. Y., 288; *Phippen v. Stickney*, 3 Metc. (Mass.), 384, 389. In our opinion, the plaintiffs in error fall far short of sustaining this burden."

Hartford Fire Ins. Co. v. C., M. & St. P. Ry. Co., 70 Fed. Repr., 207.

VI.

THIS LEASE WAS ALSO VALID, UNDER THE LOCAL LAW AND POLICY OF IOWA RELATING TO FIRES SET BY RAILWAYS.

In the concluding portion of their brief, counsel for petitioners assert that "there is a uniform and universal public policy against permitting the negligent setting out and escape of fires." (p. 13.) We concern ourselves with this proposition only in so far as it affects the particular state of facts in controversy. It is unquestioned that the State of Iowa has a definite and settled *policy* in respect to liability for fires set in operation of railways within its borders, and that such policy is declared in its statutes and judicial decisions.

1 McClain's Ann. Code of Iowa, Sec. 1972 (old Sec., 1289), provides: "That any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, etc."

In the *Griswold* case it was contended that a similar exemption in a railroad lease was obnoxious to this statute and opposed to the public policy of Iowa, but, in holding otherwise, the Supreme Court of that state, said:

"The former opinion holds correctly that the liability of railroad corporations, under section 1289 (1972), for negligently setting out fires, is absolute, and that the obligation on the part of the railroad companies to exer-

cise care is towards the public; but the question remains whether that section applies to cases like this, or, in other words, whether it established any interest in the public, or imposed any duty upon the defendant towards the public, in respect of the property of the plaintiff. The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence the provision in section 1289 making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. * * * This is not a question whether, under section 1289 (1972), the defendant would be liable to Griswold for negligently communicating fire to this property in the absence of a contract to the contrary, but it is whether the public has any interest that this contract contravenes. It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289 or otherwise, that would be injured by giving effect to the agreement in question."

Griswold v. Ill. Cent. R. R. Co., 90 Ia., p. 270.

See, also, the Iowa Code, Sec. 1308 (1 McClain's Ann. Code, Sec. 2007), provides that :

"No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist, had no contract, receipt, rule or regulation, been made or entered into."

As to this section, the court further said :

“ It is contended that the defendant entered into this contract *in its capacity as a common carrier*, and therefore we must apply to the consideration of the question section 1308, providing, in effect, that carriers of persons or property cannot exempt themselves from liability by contract which would exist had no contract been made. It is undoubtedly true that the ultimate purpose of the defendant in entering into this contract was the promotion of its business as a common carrier. But the contract is not for the carriage of persons or property. That the ultimate purpose was to increase its business as a carrier does not make this a contract for carriage any more than would be the employment of workmen in its shops, warehouses or elsewhere apart from the operation of the road. Upon further consideration we are of the opinion that this contract was not made by the defendant in its capacity as a common carrier, and that the provision of section 1308 is not applicable.” (p. 272.)

By the above quotations it will be seen that the Iowa court construed these sections of the local statute, and expressly held that they did not invalidate the provision or covenant in that lease which relieved the railroad company from liability for fires negligently set by employes in the operation of its road. It was decided that the facts did not bring the case within those statutes, or the policy of the law as declared therein. We contend, therefore, that so far as the question rests upon statutory interpretation, this court will feel bound to follow that decision, upon the principle that local construction of state statutes is binding upon Federal courts. As said by Mr. Justice SANBORN :

“ It constitutes an authoritative construction of the statutes of the states.” (70 Fed. Repr., 203.)

It is also evident that the Supreme Court held these statutes to be declaratory of the *public policy* of the State of Iowa, in respect to the very question at issue in this

case, and decided that such policy was not violated by the lease in question: This, in regard to a matter of local concern—the creation of a leasehold interest in or right to real estate within its own borders. This lease created and conveyed an interest in real property within the State of Iowa, upon a certain *condition precedent*. The leasehold estate was to vest only upon condition that the lessor be exempt from liability for damage caused by use of adjoining premises. The validity of this condition directly concerned, and indeed controlled the existence of the lease itself. If legal, the estate vested and there is no liability for loss by this fire. If illegal, no estate was created and Simpson, McIntire & Co. occupied these premises without right or authority.

“As to conditions precedent strict performance is required, and if it becomes impossible from any cause, the estate cannot vest.”

Wood's Landlord & Tenant, p. 435.

“A condition precedent is one to be performed before the leasehold estate can vest. But if the performance is impossible or *unlawful*, no estate will vest under the condition.”

12 Am. & Eng. Ency. of Law, p. 1000.

Now, the highest judicial tribunal of the state wherein this land is situated, has determined that such *condition* of the lease was valid; that it was not repugnant to any statute or obnoxious to any policy of the State of Iowa. The Griswold case constitutes a local rule for that state. It holds that leasehold title to real estate may be lawfully created and conveyed upon condition that the grantee assumes all risk of fire set by use of the adjoining premises. By affirming the legality of this condition, which is *precedent* to the vesting of the estate, it necessarily settles the

validity of the title itself. Does not this opinion, applied to the facts at bar, sustain all leasehold estates in Iowa land created upon like conditions? Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson v. Chew, 12 Wheaton, 153.

Green v. Neal's Lessee, 6 Peters, 291.

Swift v. Tyson, 16 Peters, 18.

Suydam v. Williamson, 24 How., 427.

Beauregard v. N. O., 18 How., 497.

Williams v. Kirtland, 13 Wall., 306.

R. R. Co. v. Natl. Bank, 102 U. S., 57.

Bondurant v. Watson, 103 U. S., 281.

In *Jackson v. Chew*, this court, in 1827, followed decisions of the New York courts settling a rule of construction of devises of real estate, saying :

"This court adopts the state decisions, because they settle the law applicable to the case ; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the state, when applied to the title of lands. And such a course is indispensable in order to preserve uniformity ; otherwise the peculiar constitution of the judicial tribunals of the states and of the United States would be productive of the greatest mischief and confusion." (p. 167.)
 "And whether these rules of land titles grow out of the statutes of a state or principles of the common law adopted and applied to such titles can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other." (p. 168.)

The same reason was also forcibly expressed in the later case of *Green v. Neal's Lessees*, *supra*, where this court, reversing its former holding, followed a decision of the

Tennessee court as to the construction of a state statute of limitations affecting title to real estate.

The court said :

"Here is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is, therefore, essential to the interests of the country, and to the harmony of the judicial action of the Federal and state governments, that there should be but one rule of property in a 'state.'" (p. 300.)

Suppose the defendant having executed this lease, had refused to give possession of the demised premises, and Simpson, McIntire & Co. had sued therefor, in the state court. If the company should defend upon the ground that the lease was void and conveyed no legal title to or right of possession of the land, because made upon a condition contrary to public policy, would not the Iowa court, following the rule of the *Griswold* case, promptly give judgment awarding possession to the tenants? Would not such a decision establish a *local rule* for that state? Would this court, in a similar case, refuse to follow such rule and hold the lease invalid as against a supposed public policy, and thereby establish two different policies for, and create two conflicting rules of property in the same state?

But, granting that the *Griswold* case did not establish what is strictly termed a "rule of property," still it remains that the question was largely, if not entirely, *local* in its nature and in respect to which the State of Iowa had a settled policy of its own, which was declared in that suit. In general, the public policy of a state means the *local self-interest* of that commonwealth. What that shall be, must necessarily be determined by the state itself. No other state can decide for it; the United States cannot.

For instance, each state must judge for itself what its *policy* shall be towards corporations of another state. It may admit or exclude them, arbitrarily. It may receive them upon such terms as it sees fit to exact, and neither the state creating the corporation, nor the Federal government, can object or interfere. This doctrine has been carried so far that this court has refused to interfere with the action of the State of Wisconsin in revoking the license of a foreign insurance company, because it removed a suit against it, from the state into the Federal court, contrary to the laws of that state.

Doyle v. Ins. Co., 94 U. S., 535.

This local self-interest or policy of a state may change from time to time, just as that of an individual. Different conditions may affect or control it. Of these, it must necessarily judge for itself, unhampered by the control of any other state, or of the United States. Another sovereignty might possibly decide more wisely what was for the best interests of Iowa, but, it alone, has the final power to determine what its own policy shall be ; so, also, with the national government as to those interests confided exclusively to its charge. This public policy of a state is usually evidenced by its written laws. Statutes are declaratory of the policy of the state in a given matter ; but, in the absence of legislative declaration, such policy is ascertained and announced by its judicial decisions. Indeed, public policy is to be sought from decisions as well as statutes, because the policy of a state is the law of that commonwealth, whether enacted by statutes or expressed by courts. This doctrine has been recognized by Federal courts from an early time. They have uniformly declined to make or control a local policy for any state, but have contented themselves with ascertaining such policy

from the statutes or decisions of the particular state, and then following it.

Thus in 1839, in the leading case of *Bank of Augusta v. Earle*, 13 Peters, 519, this court, in considering the power of corporations created by one state, to make contracts and do business in another state, say :

"The state has not made known its policy upon any of these points. And how can this court, with no other lights before it, undertake to mark out by a definite and distinct line the complex and intricate question of political economy. * * * How can this court with no other aid than her general principles asserted in her constitution, with her investments in the stocks of her own banks, undertake to carry out the policy of the state upon such a subject in all of its details, and decide how far it extends, and what qualifications and limitations are imposed upon it? These questions must be determined by the state itself, and not by the courts of the United States. Every sovereignty would without doubt choose to designate its own line of policy; and would never consent to leave it as a problem to be worked out by the courts of the United States from a few general principles, which might very naturally be misunderstood or misapplied by the court. It would hardly be respectful to a state for this court to forestall its decision, and to say, in advance of her legislation, what her interest or policy demands. Such a course would savor more of legislation than of judicial interpretation." (p. 594.) *

* * "When a court is called on to declare contracts thus made, to be void upon the ground that they conflict with the policy of the state, the line of that policy should be very clear and distinct to justify the court in sustaining the defense." (p. 597.)

So, also, in *Vidal v. Girard's Executors*, 2 Howard, 127, this court, in sustaining a devise of Stephen Girard to the City of Philadelphia for the establishment of a college for poor orphan boys, upon certain principles therein prescribed, say, STORY J. :

"This objection is that the foundation of the college upon the principles and exclusions prescribed by the tes-

tator, is derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania. * * * In considering this objection, the court are not at liberty to travel out of the record in order to ascertain what were the private religious opinions of the testator (of which indeed we can know nothing), nor to consider whether the scheme of education by him prescribed is such as we ourselves should approve, or as is best adapted to accomplish the great aims and ends of education. Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. Above all, when that topic is connected with religious polity, in a country composed of such a variety of religious sects as our country, it is impossible not to feel that it would be attended with almost insuperable difficulties, and involve differences of opinion almost endless in their variety. *We disclaim any right to enter upon such examinations, beyond what the state constitutions, and laws and decisions necessarily bring before us.*" (p. 197-8.)

In *Teal v. Walker*, 111 U. S., 242, a statute of Oregon provided that a mortgage of real property should not be deemed a conveyance so as to enable the mortgagor to recover possession of the estate, without foreclosure and sale by law. The mortgage in question stipulated that the mortgagor would deliver possession upon default in payment of the mortgage debt. In holding such provision void, this court say, WOODS, J. :

"That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet like all con-

tracts opposed to the public policy of the state, it cannot be enforced." (p. 252.)

In *Bucher v. Cheshire R. R. Co.*, 125 U. S., 555, a statute of Massachusetts forbade traveling on Sunday except for necessity or charity, under penalty of a fine. Plaintiff was injured while riding upon the railway in violation of this statute. State cases had held that there could be no recovery for personal injuries received under such circumstances, and this court, MILLER, J., followed such decisions as establishing the local law of Massachusetts on that subject, although not agreeing with their reasoning or conclusion, saying:

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property, as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the Federal courts."

In *City of Detroit v. Osborne*, 135 U. S., 492, a personal injury had resulted from negligence of the city in failing to keep its street in repair. Under statutes of Michigan the power and duty to keep streets in repair was vested in the state, but the Supreme Court of that state had decided that such duty was merely to the public and not to private individuals, and that its neglect gave no right of action to a person injured thereby. This court held that such decisions settled the local law of Michigan and must be followed, although opposed to its own reasoning.

It was said by BREWER, J. :

"But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact

remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning and conclusion of that court is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts and all its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law. It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state. While this court has been strenuous to uphold the supremacy of Federal law and the interpretation placed upon it by the Federal courts, *it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the state, and that law is not what this court might determine, but what the Supreme Court of the state has determined.*"

In *Etheredge v. Sperry*, 139 U. S., 266, this court also held that Iowa decisions holding chattel mortgages to be valid in that state, which expressly provided that the mortgagor should remain in possession and sell the mortgaged property in the usual course of trade, established a rule of property or local law, and would be followed by Federal courts. BREWER, J. :

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily at least, a matter of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will

accept the settled law of each state as decisive in respect to any case arising therein.”

See, also :

Chicago Bank v. Kansas City Bank, 136
U. S., 235.

Brown v. Furniture Co., 7 Cir. Ct. App.,
225.

Swann v. Swann, 21 Fed. Rep., 299.

Under the doctrine of these cases, we think that the question of public policy, in regard to contracts of immunity for the negligent setting of fires by railway trains, under circumstances like those at bar, may well be held to be local to the State of Iowa, and settled by its courts adversely to petitioner's contention here. The precise point, however, was not necessary to the decision of this case, and should not be made the occasion of review by this honorable court, as it has now become merely a moot question in the case.

In conclusion, we have only to say that these insurance companies solicited and took the risk upon this warehouse and contents, presumably at a rate based upon the added exposure to fires from passing trains, and now seek to reap where they have sown not, by invoking a supposed public policy to recover what they received full consideration for assuming. We submit that the claim does not strongly appeal to an enlightened public policy, and that the Circuit Court of Appeals were right in so declaring.

Respectfully submitted.

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